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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

VARIAN ASSOCIATES, INC.,
Petitioner,

vs.

MILTON UTLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. When a purported state law claim is premised exclusively upon violation of a federal statute, and that statute establishes an exclusive remedy for its enforcement through federal administrative procedures, does the claim present a "substantial federal question" supporting its removal to federal court?

2. Does a purported state law claim based solely upon an employer's alleged violation of federal Executive Order 11246 and its implementing regulations "arise under" federal law, allowing it to be removed to federal court?

3. Can a claim "arise under" federal law for federal jurisdiction purposes if the federal statute upon which the claim is based does not allow a private right of action in federal court for its enforcement?

PARTIES

The parties to the proceedings below were 1) the individual plaintiff, Milton Utley; and 2) defendant Varian Associates, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Varian Associates, Inc., respectfully petitions that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 7, 1987.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the Ninth Circuit, filed on March 3, 1987, is officially reported at 811 F.2d 1279. It is unofficially reported at 43 FEP Cases 191 and 42 EPD ¶ 36,863. The court's amended opinion, filed on April 7, 1987, as yet is not reported. The court's March 3, 1987 opinion, its order of April 7, 1987 modifying and amending the opinion, and its order of April 23, 1987 denying Petitioner's petition for rehearing and suggestion for rehearing en banc are included in the appendix to this petition. (Appendix A)

The district court's opinion is officially reported at 625 F.Supp 104 (N.D. Cal. 1985). The opinion is unofficially reported at 38

FEP Cases 1755 and 38 EPD ¶ 35,683. It is reprinted in the appendix. (Appendix B)

JURISDICTION

The jurisdiction of the district court was invoked under 42 U.S.C. § 1331 by a petition for removal filed pursuant to 28 U.S.C. § 1441. Federal question jurisdiction was alleged to exist because three of the causes of action arose under Executive Order 11246, § 202 *et. seq.*, 30 Fed Reg. 12319 (1965), reprinted in 42 U.S.C. § 2000e appendix at 28-31 (1982), and its implementing regulations, 41 C.F.R. ch. 60 (1985).

The original opinion of the Court of Appeals was filed on March 3, 1987. Petitioner filed a petition for rehearing and suggestion of rehearing en banc on March 17, 1987. The Court of Appeals amended its opinion on April 7, 1987, and denied the petition for rehearing on April 23, 1987.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The jurisdictional statute upon which petitioner relies is 28 U.S.C. § 1331, which states:

§ 1331. Federal Question

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

The removal statute upon which petitioner based its removal petition was 28 U.S.C. § 1441, which states:

§ 1441. Actions removable generally

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State Court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence

of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

(d) . . .

STATEMENT OF THE CASE

This case began as a race discrimination action in which respondent Milton Utley (hereafter "Utley") alleged that he was terminated by petitioner Varian Associates, Inc. ("Varian") because he was black. The original complaint sought recovery based upon California's employment discrimination statute and upon state common law principles of wrongful discharge.

Subsequently, confronted with a motion for summary judgment on these causes of action, Utley sought and was granted leave to amend his complaint to add three causes of action premised upon the allegation that, because he was black, Varian as a federal contractor was obligated by Executive Order 11246 and its implementing regulations (41 C.F.R. ch. 60) not to lay him off when it eliminated his position and was further obligated to place him in another position or allow him to displace a non-minority employee. Varian's failure to provide such preferential treatment to plaintiff because of his race was alleged by plaintiff to violate Varian's "affirmative action" obligations under the executive order and, in itself, to make Varian liable under California's employment discrimination statute (the California Fair Employment and Housing Act), under a California statute prohibiting "unlawful business practices" (Cal. Bus. & Prof. Code § 17200), and under a common law theory of misrepresentation (*viz.*, that Varian misrepresented itself as an "equal opportunity employer" by failing to comply with its federal affirmative action obligations).

Varian's violation of the executive order and its implementing regulations was the *sole* basis of each of plaintiff's additional claims. Under the theory of the complaint, Utley's right to recover hinged completely upon whether the executive order and its regulations required the specified conduct and upon whether Varian complied with those requirements.

Varian removed the action to federal court under 28 U.S.C. § 1441, alleging that the claims presented significant federal questions and therefore "arose under" federal law. Because the executive order and the implementing regulations of the Department of Labor establish administrative procedures and remedies for enforcement of the regulations, Varian also moved under Rule 12(b)(6) to dismiss the three new "affirmative action" claims for failure to state a claim upon which relief can be granted, arguing that the administrative remedies are the exclusive means by which the executive order's requirements may be enforced. Respondent in turn moved to remand.

The district court denied respondent's motion to remand and granted Varian's motion to dismiss. With respect to the removal question, the court stated:

> "A suit arises under federal law within 28 U.S.C. § 1331 if the complaint, properly pleaded, presents a substantial dispute over the effect of federal law, and the result turns on the federal question. . . . A substantial proposition of federal law must form 'a direct and essential element of plaintiff's cause of action.' "

625 F.Supp at 105.

The court concluded that resolving the affirmative action claims "will require the court to determine whether federal law created a duty, and if it did, the nature of that federal duty and whether defendant's conduct constituted a breach of that duty. The case is, therefore, a clear example of 'a substantial dispute over the effect of federal law' where 'the result turns on the federal question.' " *Id.* at 106.

Having found jurisdiction to exist upon the allegations of the complaint, the district court then held that the administrative remedial scheme established by the regulations was intended by the executive to be the exclusive means of enforcing the executive order's requirements and therefore preempted any enforcement

efforts in the state and federal courts. The court accordingly granted Petitioner's motion to dismiss the three executive order claims and remanded the remaining claims, which were based solely on state law, to the state court.

On appeal, the Ninth Circuit reversed. It did not question, and indeed agreed, that the affirmative action claims were predicted solely on Varian's alleged violation of federal law and necessarily turned on resolution of the federal question. It further agreed that no federal judicial claim was cognizable outside the administrative scheme established by the executive order. The court nevertheless concluded that the absence of any federal judicial remedy precluded a finding that the case involved "a substantial federal question" permitting removal. According to the Court of Appeals, "[I]f a federal law does not provide a private right of action, then a state law action based on its violation *perforce* does not raise a 'substantial' federal question." (emphasis added) The sole support given for the ruling was this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, ____ U.S. ____, 106 S.Ct. 3229 (1986).[1]

In answer to Varian's argument that the executive order does provide private federal remedies to redress violations of the regulations, including the right of individuals to file administrative complaints and to recover backpay, the Court of Appeals held, "These remedies . . . are not comparable to a suit against the employer in federal court. . . . Only if the executive order provides Utley with a private right of action against Varian *in federal court* might this compaint raise a 'substantial' federal question permitting removal jurisdiction." Again, the only authority cited for this proposition was a general reference to *Merrell Dow*.[2]

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[1] In its original opinion, the Court of Appeals explained this conclusion by stating that *Merrell Dow* "expressly rejected finding federal question jurisdiction based on the relationship between the federal question and the state claim." 811 F.2d at 1283. This characterization of the *Merrell Dow* opinion was withdrawn by the court in its amended opinion, but the court's conclusion based upon the characterization remained.

[2] The panel further held that the absence of a federal judicial remedy precluded removal of the claims under the artful pleading doctrine,

On March 17, 1987, Petitioner filed a petition for rehearing and suggestion for rehearing en banc, arguing that the panel decision 1) misapprehended this Court's ruling in *Merrell Dow* and 2) overlooked contrary authority in this Court, prior authority in the Ninth Circuit, and authority in other circuits. On April 7, 1987, the court entered an order amending its original opinion to delete a statement characterizing *Merrell Dow* as rejecting any analysis of the relationship between the federal question and the state claim. On April 23, 1987, it denied the petition for rehearing without further comment.

REASONS FOR GRANTING THE WRIT

Succinctly stated, this Court should grant certiorari because the Court of Appeals' decision imposes significant and unprecedented restrictions on the jurisdiction of the federal courts and threatens uniformity of application and the integrity of the administrative procedures established by the Department of Labor under Executive Order 11246. The decision also conflicts with prior decisions of this Court and decisions in other circuits.

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rejecting Petitioner's argument that the existence of an exclusive administrative remedial scheme is a sufficient "superseding remedy." Without citation of authority, the court stated, "The superseding federal remedy must provide a right of action *in federal court.*" Petitioner has not included the Court of Appeals' ruling on the artful pleading issue as a separate question in this petition. Reliance on the artful pleading doctrine is not necessary because respondent's well pleaded complaint expressly relied upon federal law as the sole basis of the causes of action. Also, the question of whether a federal judicial cause of action is necessary to establish jurisdiction is common to both issues and can be resolved by this Court on the "arising under" issues raised by the Petition.

I. THE NINTH CIRCUIT'S NOVEL AND UNWARRANTED EXPANSION OF THIS COURT'S DECISION IN MERRELL DOW SIGNIFICANTLY REDUCES THE FEDERAL QUESTION JURISDICTION OF THE FEDERAL COURTS AND RAISES IMPORTANT JURISDICTIONAL ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT.

The Court of Appeals held that a state law cause of action based solely on an alleged violation of federal law "perforce" does not raise a substantial federal question, and therefore cannot "arise under" federal law, unless the federal statute allows a private right action in federal court. This decision conflicts with established authority in this Court holding that a claim "arises under" federal law if the federal statute creates the cause of action asserted or if the claim, and the plaintiff's right to relief on that claim, necessarily depends upon a substantial question of federal law. This rule first was enunciated in *Smith v. Kansas City Title & Trust Co.*, 225 U.S. 180 (1921), where the Court held:

> "The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under [the statute granting federal question jurisdiction].
>
> *Id.* at 199.

The doctrine in *Smith* was affirmed in *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1 (1983), where a unanimous Court stated: "We have often held that a case 'arose under' federal law where the vindicaion of a right under state law necessarily turned on some construction of federal law. . . . " *Id.* at 9. "Even though state law creates appellant's cause of action, its case still might 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Id.* at 13. "Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from the state court, only those cases in which a well-pleaded complaint established *either*

that federal law creates the cause of action *or* that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." *Id.* at 27-28 (emphasis added).

None of these rulings were affected by *Merrell Dow*, which involved a state negligence cause of action in which one of the asserted elements of the defendant's negligence was its alleged failure to comply with the labeling requirements of the federal Food, Drug and Cosmetics Act (FDCA). This violation allegedly created a rebuttable presumption of negligence on the part of the defendant. Noting that the violation of federal law was simply "an element of" the plaintiff's negligence claim, and further noting that Congress had not established any private federal remedies for enforcement of the statutory standards which would be interfered with by state resolution of the federal issue, the Court held:

> "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as *an element of* the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. . . . [T]he congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as *an element of* a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction."
>
> 106 S.Ct. at 3235-36 (emphasis added).

At no point in the opinion did the Court in any way reject or limit the jurisdictional test established in *Smith* and *Franchise Tax Board*. To the contrary, it expressly noted that "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law,' " citing *Franchise Tax Board* and *Smith v. Kansas City Title & Trust Co.* *Id.* at 3233.

Merrell Dow was a logical application of prior case law, beginning with *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205 (1934). In *Moore*, this Court held that a state negligence cause of action does not arise under federal law simply because one element of the defendant's negligence is an alleged violation of a federal statutory standard. The rationale of these prior cases

is that "negligence" is a concept created by state law. A defendant's violation of the state standard, and the plaintiff's right of recovery, is not *necessarily* based on violation of a federal statute where the alleged violation is only "an element of" a course of conduct and may or may not result in a determination that the overall course of conduct satisfied the *state's* standard of reasonable care. The plaintiff's recovery is sought not "by virture of" a violation of federal law, but because the violation constitutes evidence (presumptive or otherwise) of a failure to exercise due care under the state's negligence standard. In *Merrell Dow*, because the alleged federal law violation was only "an element of" the plaintiff's cause of action, and because Congress did not establish private federal remedies for enforcement of the FDCA that would be impaired by the state proceedings, this Court concluded that the involvement of the federal issue was not sufficiently significant to classify the negligence cause of action as one "arising under" federal law. 106 S.Ct. at 3234-36.

The Court of Appeals' decision turns *Merrell Dow* upside down, construing it to stand for the proposition that, regardless of the significance of the federal issue, regardless of whether the federal issue is dispositive of the plaintiff's right to recover, regardless of whether the federal statute establishes a remedial scheme for private individuals that may be impaired by private judicial enforcement in the state courts, and regardless of whether state law has independent requirements upon which liability can be based, a cause of aciton "perforce" cannot "arise under" the federal law unless the federal statute it invokes may be enforced by a private civil action in federal court. Petitioner respectfully submits that this ruling not only is unsupported by *Merrell Dow*, but also misapprehends its approach and is in direct conflict with this Court's decision in *Franchise Tax Board* and other cases.

First, the opinion of the Court of Appeals acknowledges the dispositive nature of the federal statutory issue, but essentially deems that fact to be irrelevant. In so doing, it wholly ignores the major premise of this Court's ruling in *Merrell Dow*—that the federal statutory violation was simply "an element of" the plaintiff's claim and therefore not dispostive on the question of the plaintiff's right to recover or the defendant's liability.

Second, the Court of Appeal's ruling that *Merell Dow* requires the existence of a private right of action *in federal court* before a claim can "arise under" federal law is not supported by any ruling or language in *Merell Dow* itself. Although this Court in *Merell Dow* used phrases such as "federal cause of action", "private federal remedy", "federal private cause of action", "federal remedy", and "private federal cause of action" interchangeably, at no point did it state that the federal "remedy" or federal "cause of action" it was seeking was a right to sue in federal court.[3] Indeed, it would appear from *Merrell Dow* that it was Congress' determination not to afford a "federal remedy," not its failure to allow a private right of action in federal court, that the Court deemed significant. 106 S.Ct. at 3234-35, 3235-36. Absent a congressional intent to establish a federal remedial scheme, no congressional purpose would be frustrated by state proceedings in which the statutory violation is simply "an element of" a state law negligence claim. Here, of course, the regulations by which the executive order is implemented establish extensive enforcement procedures, including private federal remedies. As the Court of Appeals itself held, private rights of action in the courts not only would impair these procedures, but also would conflict with the executive order's intent to have disputes resolved by conference and conciliation. 811 F.2d. at 1285-86. Thus, the intention here *was* to provide private *federal* remedies to individuals, and to have those remedies pursued in a federal administrative forum—a situation wholly different from that presented in *Merrell Dow*.

Finally, the decision of the Court of Appeals focuses solely on the second half of the test in *Franchise Tax Board* and does not even address the first part—whether the cause of action is "created by" federal law. It is by no means clear, however, that the executive order causes of action were not "created by" federal

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[3] The phrase "cause of action" does not connote or imply an action *in federal court*. A cause of action is simply a right of action on a specific fact or set of facts. *McMahon v. United States*, 186 F.2d 227, 230 (3rd Cir. 1950). *See also, Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927); *Hurn v. Oursler*, 289 U.S. 238, 246-47 (1933). That "cause of action" may exist in a variety of forums, including, for example, an administrative agency. *McMahon, supra*, 186 F.2d at 230.

law. Respondent alleged that state law simply "adopted" the violation of the federal law and provided additional remedies for the violation. No existing state law created any "affirmative action" obligations or any other cause of action for the specific conduct that allegedly violated the executive order's requirements. Thus, the only obligations at issue were those established for federal contractors by the federal executive order: the same conduct by an employer who was *not* a federal contractor would not be actionable. As a result, the causes of action were to a very real extent creatures of *federal* law; the sole function of the state was to provide additional remedies for a federal contractor's failure to comply with its federal obligations. Federal jurisdiction therefore existed under *both* prongs of the *Franchise Tax Board* test: the causes of action were created by federal law and existed only by virtue of that law, and plaintiff's right to relief necessarily depended on resolution of a substantial question of federal law.

It therefore appears that the Ninth Circuit's decision limiting federal question jurisdiction to claims that involve federal statutes which allow a private right of action in federal court constitutes a significant and unwarranted expansion of this Court's ruling in *Merrell Dow*—an expansion contrary to *Smith* and *Franchise Tax Board* and not supported by either the holdings, the text, or the philosophy of *Merrell Dow*. If allowed to stand, it would reduce significantly both the original and the removal jurisdiction of the federal courts and would remit actions to enforce federal law exclusively to the state courts unless Congress creates a right of action *in federal court* as part of the statutory scheme.

This Court should grant review of the decision to protect the jurisdiction of the federal courts, to preserve the rulings of *Smith* and *Franchise Tax Board*, to clarify the scope and meaning of *Merrell Dow*, to reverse the clear error of the Ninth Circuit, and to provide specific guidelines to the lower courts on the test to be applied in determining federal jurisdiction when violation of federal law is more than just "an element of" a putative state law claim. By addressing the issue now, the Court will avoid unnecessary litigation and further confusion in the area.

II. THE DECISION OF THE COURT OF APPEALS PRESENTS A CONFLICT WITH DECISIONS IN OTHER CIRCUITS THAT SHOULD BE RESOLVED BY THIS COURT

In addition to the conflict in general approach and philosophy toward federal question jurisdiction between the Ninth Circuit's decision and prior decisions of this Court, there also exists a more specific conflict between the circuits involving the executive order itself. In *Farkas v. Texas Instruments, Inc.*, 375 F.2d. 629 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967), the Fifth Circuit rejected the argument that, because the executive order does not permit a private judicial action to enforce its requirements, a cause of action based upon a federal contractor's violation of its affirmative action obligations was outside the district court's jurisdiction under 28 U.S.C. § 1331—the identical question presented in the Ninth Circuit below, but with an opposite result.

The Fifth Circuit in *Farkas* specifically held that the failure of the executive order to create a private right of action by which its mandate may be enforced does not deprive the federal courts of jurisdiction over claims premised upon its violation. Citing this Court's decision in *Bell v. Hood*, 327 U.S. 678, 682 (1946), the court noted the necessity of a federal court assuming jurisdiction to determine whether a cause of action invoking federal statutory rights is one upon which relief can be granted. As the court pointed out, district courts *do* have jurisdiction over allegations that federal rights have been violated, if for no other reason than to determine that the federal statute involved does not allow the claim asserted and that the allegations therefore do not state a claim upon which relief can be granted. In other words, the conclusion that the federal statute precludes a federal or state judicial remedy does *not* defeat the court's jurisdiction to rule on that question if the statute forms the basis of the claim, either as alleged or by necessity. It simply means that the court must dismiss the claim under Rule 12(b)(6), as did the district court here. Quoting this Court's ruling in *Bell v. Hood*, "The reason for this is that the court must assume jurisdicition to decide whether the allegations state a cause of action on which the court can grant relief . . . ." 327 U.S. at 682-83. On this rationale, the court in *Farkas* held that a contract claim alleging violation of rights

under Executive Order 11246 was *within* the federal question jurisdiction of the federal courts, even though the executive order precluded any right of action in federal court, and dismissed the claim on the ground that the administrative remedies under the executive order were exclusive.

The Fifth Circuit's decision in *Farkas* is supported by *Bell v. Hood, supra*, where this Court held that the question of whether a suit can be maintained in the federal courts "is not decisive on the question of jurisdiction of the federal court." 327 U.S. at 681. According to the Court, jurisdiction exists to determine that very question. *Id.* at 682-83. It therefore appears that the Fifth Circuit's decision if *Farkas* concerning federal jurisdiction over a claim based solely upon violation of the executive order has a solid foundation in prior decisions of this Court, as well as in common sense logic.

Thus, the Ninth Circuit's opinion not only is at odds with this Court's decisions in *Smith* and *Franchise Tax Board,* but also conflicts with the jurisdictional decision of the Fifth Circuit on the identical question and identical statute. As pointed out above, this Court should resolve this conflict a soon as possible to clear up the confusion almost certain to be caused by the published decision below on an issue of importance to the federal courts and federal practitioners nationwide.

III. THE DECISION IMPAIRS SIGNIFICANT FEDERAL INTERESTS INVOLVING THE INTEGRITY OF THE EXECUTIVE ORDER'S REMEDIAL SCHEME AND THE CONSISTENCY OF ITS INTERPRETATION AND APPLICATION

As Mr. Justice Brennan pointed out in *Merrell Dow*, Congress established the "arising under" jurisdiction of the federal courts to provide uniformity of decision throughout the United States on subjects of federal law. The federal courts are more familiar with federal interests, more experienced and skilled at interpreting and applying federal law, and, although not a perfect vehicle for uniformity, leave less room for variation than would be the case if statutory interpretation were left to the various levels of courts in each of the fifty states. 106 S.Ct. at 3242-43.

It is understandable for this Court to have concluded in *Merrell Dow* that these interests are not materially impaired where a federal statutory standard is merely "an element of" a negligence claim in which a jury is asked simply to note the federal standard and to determine in an unpublished opinion whether a defendant's conduct, in light of the federal statutory standard and other factors, was negligent under a state standard of reasonable care. Quite another situation is presented, however, where the federal statute establishes a specific regulatory scheme and enforcement mechanism and provides individuals with specific remedies for violations of the statutory requirements. The Court of Appeals itself recognized that "a private judicial remedy would not be particularly consistent with the 'underlying purposes' of the affirmative action program" and that "a private action against the employer for affirmative-action violations could very well circumvent the Secretary's conciliation efforts, upsetting the administrative enforcement mechanism contemplated by the executive order." 811 F.2d. at 1280. *See also, San Diego Building Trades Council v. Garmon.* 359 U.S. 236, 246-47 (1959) (noting the inherent conflict with federal labor policy in allowing states to provide remedies for conduct arguably subject to the jurisdiction of the National Labor Relations Board and stating, "[S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy . . . which has been withheld from the National Labor Relations Board only accentuates the danger of conflict."); *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, ____ U.S. ____, 106 S.Ct. 1057, 1062 (1986) (pointing out that involvement of the states in penalizing persons for conduct violative of the N.L.R.A. incrementally diminishes the N.L.R.B.'s control over enforcement of the N.L.R.A. and further detracts from the integrated scheme of regulation created by Congress).

The clear intent of the executive was to establish an integrated federal administrative system for interpreting and applying the executive order through regulations, investigations, and affirmative action audits, and through a remedial scheme that includes an emphasis on negotiation, conciliation and back pay remedies on behalf of aggrieved individuals. It therefore is difficult to avoid a conclusion that the federal interest in preserving federal juris-

diction to promote uniformity of interpretation and application, and to preserve the integrity of the federal administrative and remedial scheme, is far more significant here than the arguable federal interest involved in *Merrell Dow*, where uniformity of interpretation was not a significant factor and where there existed no private remedial scheme that would be subject to circumvention or impairment.[4]

Allowing state court judges and juries to impose their own concepts of affirmative action obligations on federal contractors, or to minimize or limit the obligations otherwise imposed by the department of Labor through its regulations, would subject federal contractors to unknown, often conflicting obligations, subject them to liabilities far in excess of the liabilities contemplated by the executive order and its implementing regulations, and possibly impair the rights of individuals to relief under the regulations. One example of this threat is posed by the present case, where all of the executive order causes of action would carry a right to emotional distress and punitive damages and would be tried in a state where punitive damage verdicts in employment termination cases have been rendered in excess of ten million dollars. Such potential liabilities even could impose significant burdens on the future contracting abilities of the federal government.

The intention of the executive here clearly was to establish a federal enforcement and remedial scheme exclusive of any judicial remedies. Where the executive order's obligations are the absolute predicate of a plaintiff's right of recovery, it makes little sense to hold that federal jurisdiction does not exist over the cause of action simply because the executive did not allow a private

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[4] As the respondents in *Merrell Dow* consistently pointed out in their briefs, Congress purposefully eliminated proposed provisions for a federal remedy in the Food, Drug and Cosmetics Act, expressly deferring instead to already existing state remedies. This absence of a federal remedy meant that state negligence claims would not burden federal enforcement of the Act. Indeed, in *Moore v. Chesapeake & Ohio Railway*, *supra*, the doctrinal precedent for *Merrell Dow*, this Court specifically noted that the federal statute incorporated in the state law negligence claim did not lay down rules governing actions to enforce its rights which would be impaired by state proceedings. 291 U.S. at 215.

right of action *in federal court*.[5] Nothing in *Merrell Dow* requires, or even suggests, such a result, and the significant federal interests impaired by the Ninth Circuit's ruling warrant this Court's intervention.

IV. REQUIRING THE EXISTENCE OF A FEDERAL JUDICIAL REMEDY AS A PREREQUISITE TO REMOVAL OF A CLAIM BASED UPON FEDERAL LAW DEPRIVES INDIVIDUALS CHARGED WITH A VIOLATION OF FEDERAL LAW OF THEIR RIGHT TO A FEDERAL FORUM

Congress' grants of jurisdiction to the federal courts, as reflected in, for example, 28 U.S.C. §§ 1331 and 1441, is more than a bestowal of permission, or a grant of discretionary authority, for district courts to rule on specific types of controversies. They establish on behalf of individual litigants a right, subject to narrow restrictions, to have these controversies heard and determined, and to have their federal rights and obligations adjudicated, in the federal courts. As Chief Justice Marshall long ago noted:

> "It is most true that this Court will not take jurisdiction if it should not but it is equally true that it must take jurisdiction if it should.... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given...." *Cohens v. Virginia*, 6 Wheat 264, 404 (1821).

See also, Bell v. Hood, supra, 327 U.S. at 681-82 ("[W]here the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court ... must entertain the suit.")

The effect of the Ninth Circuit's decision is that petitioner, who is charged with violating federal obligations under a federal executive order for conduct not independently actionable under state law, and whose liability will be determined *solely* upon an interpretation and application of the executive order and its implementing regulations without reference to any independent

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[5] Indeed, as the Ninth Circuit itself pointed out, it is questionable whether an executive order is even *able* to create substantive regulations affecting individual rights and obligations without a specific grant of such power by Congress. 811 F.2d. 1285n.4.

state standards or requirements, will be denied any right to have the claim tested and tried in federal court. Petitioner's right to a federal forum in which to have its federal rights and obligations determined will be frustrated, and it will be forced to forego the comparative expertise of the federal courts in interpreting and applying federal law. It also will be subject to a possibly hostile forum in which to assert its federal interests and rights, including, for example, its exclusive remedy arguments, a statute of limitation defense, damage limitations, and various other technical defenses available under the regulations.

Thus, individual rights under federal law—the right to a federal forum for adjudication of federally created rights and obligations—are directly implicated and significantly impaired by the Ninth Circuit's decision. These interests are deserving of protection in this Court and constitute a further reason for granting the petition.

CONCLUSION

Certiorari should be granted to determine whether the existence of a private right of action in federal court is a prerequisite to federal question jurisdiction, to preserve the integrity of the administrative regulations and remedies under the executive order, to resolve the conflict between the Ninth Circuit's decision and prior decisions of this Court and the other courts of appeal, and to preserve the rights of private individuals to a federal forum for adjudication of their federal rights and obligations. Petitioner therefore prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: June 3, 1987

Respectfully Submitted,

GILMORE F. DIEKMANN, JR.
BRONSON, BRONSON &
McKINNON

BY _____

Attorneys for Petitioner
Varian Associates, Inc.

Appendix A

1. Original Opinion of the Ninth Circuit Court of Appeals, March 3, 1987

United States Court of Appeals
for the Ninth Circuit

No. 85-2724

D.C. No.
CV 85-2128 EFL

Milton Utley,
Plaintiff-Appellant,

vs.

Varian Associates, Inc.,
Defendant-Appellee.

Argued and Submitted
August 11, 1986—San Francisco, California

Filed March 3, 1987

Opinion

Before: Richard H. Chambers, Dorothy W. Nelson and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

Appeal from the United States District Court
for the Northern District of California
Eugene F. Lynch, District Judge, Presiding

COUNSEL

Gerard Hinckley, Esq. and Herbert W. Yanowitz, San Francisco, California, for the plaintiff-appellant.

Richard R. Dale and Gilmore F. Diekmann, Jr., San Francisco, California, for defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Milton Utley appeals from the district court's summary judgment dismissing his state law employment discrimination action

against Varian Associates, Inc. (Varian). Utley contends that the district court's removal of his action from state court was improper because his state law causes of action, some of which were predicated on Varian's alleged violation of its federal affirmative action duties, did not raise a federal question. Utley also contests the grant of summary judgment. We hold that the district court did not have removal jurisdiction over this action and therefore reverse.

I.

Varian, a federal government contractor, laid off Utley after four years of employment. Eventually, it dismissed him. Utley sued in California court, alleging five state law counts, three of which are the subject of this appeal. In his first claim, Utley alleged that Varian dismissed him bacause of his race (Utley is black) in violation of Varian's affirmative action duties as a federal contractor under Executive Order 11,246, 30 Fed. Reg. 12,319 (1965), *reprinted in* 42 U.S.C. § 2000e app. at 28-31 (1982), and its implementing regulations, 41 C.F.R. ch. 60 (1985), and thus committed an unlawful employment practice under section 12940 of the California Government Code. Section 12940 prohibits employers from discharging employees on the basis of race. Cal. Gov't Code § 12940(a) (West 1986). Utley also claimed that Varian misrepresented itself as an "equal opportunity employer" by failing to comply with the federal affirmative action program. Finally, Utley alleged that Varian's conduct constituted an unlawful business practice under section 17200 of the California Business and Professions Code.

Varian removed the action to federal district court. The district court held that Utley's reliance on the executive order gave it federal question removal jurisdiction, the case being "a clear example of 'a substantial dispute over the effect of federal law' where 'the result turns on the federal question.' " 625 F.Supp. 104, 106 (N..D. Cal. 1985) (quoting *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n.* 656 F.2d 1364, 1365-66 (9th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982)). The court granted Varian's summary judgment motion dismissing Utley's state claims to the extent they were based on violations of the executive order,

holding them to be preempted by the executive order. The court remanded Utley's remaining claims to the state court.

On appeal Utley contends that the district court did not have removal jurisdiction over the action, that the executive order did not preempt his causes of action based on the order, and that the district court should have abstained from exercising jurisdiction because of unsettled questions of state law.

II.

Utley argues that the district court's removal of his action from state court was improper, because he could not have brought his state law action in federal court in the first instance. We review the district court's decision to remove *de novo*. *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768 (9th Cir. 1986).

Removal is proper of any state civil action "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). The district court's original jurisdiction extends to "all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.* § 1331. Thus, "propriety of the removal . . . turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 106 S.Ct. 3229 (1986). The issue is whether Utley's state law claims, predicated on Varian's alleged violation of federal affirmative action duties, "arise under" federal law.

Merrell Dow clarifies the "arising under" issue in cases in which the federal law incorporated by a state law claim does not itself confer a private right of action. In *Merrell Dow* the plaintiff alleged that the defendant's misbranding of a drug in violation of the Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§ 301-392, established a rebuttable presumption of negligence in his state law products liability action. 106 S. Ct. at 3231. On defendant's petition, the district court removed the action from state court, holding that the plaintiff's reliance on the defendant's violation of the FDCA made the action one "arising under" federal law. *Id.* The Court, in rejecting the district court's reasoning and holding that it did not have removal jurisdiction, found that the lack of a private right of action under the FDCA disposed of the issue of whether a state claim based on its violation under federal law:

> [A] complaint alleging a violation of federal statute as an element of state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

Id. at 3237. The Court explained that to permit removal based on a federal statute not conferring a private right of action would disregard the will of Congress to preclude a private remedy in federal court for the statute's violation. *Id.* at 3234-35.

Merrell Dow provides the framework of analysis for this case, for Utley's state claims are based on Varian's alleged violation of federal law.[1] Varian attempts to distinguish *Merrell Dow* on two grounds. First, Varian cites *Franchise Tax Board v. Construction Laborers Vacation trust,* 463 U.S. 1, 13(1983), for the proposition that "[e]ven though state law creates [the] causes of action, [the] case might still 'arise under' the laws of the United States if a well-pleaded complaint established that [the] right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." It argues that here, unlike in *Merrell Dow*, a "substantial" federal question is necessarily raised. In *Merrell Dow*, resolution of the issue of the defendant's violation of the FDCA did not necessarily dispose of the liability issue, as the violation created only a rebuttable presumption of negligence. Here, Varian contends, determination of its liability in Utley's state law causes of action requires resolution of the "substantial" issue of its compliance with the federal affirmative action program. Varian argues that this necessary resolution of a "substantial" federal question dictates finding, under *Franchise Tax Board*, that Utley's state law causes of action arise under federal law.

We disagree. The Court in *Merrell Dow* expressly rejected finding federal question jurisdiction based on the relationship between the federal question and the state claim. 106 S. Ct. at 3237 n.15. The Court instead found that the congressional determination not to provide a private cause of action under the federal

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[1] The district court entered judgment prior to the Supreme Court's decision in *Merrell Dow* and thus did not adopt this analysis.

statute constituted "a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 3236. Under *Merrell Dow*, if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" federal question.

Varian also argues that Utley has a private, federal remedy to redress violations of the affirmative action program. Varian points to the availability of judicial review under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706; *see Legal Aid Soc'y v. Brennan*, 608 F.2d 1319 (9th Cir. 1979), *cert. denied sub nom. Chamber of Commerce v. Legal Aid Soc'y*, 447 U.S. 921 (1980), and administrative enforcement initiated by employee complaints, Exec. Order No. 11,246 §§ 206, 208-209; 41 C.F.R. §§ 60-1.20 to -1.28 (employee complaint, hearing, and sanction proceedings); *see also infra* section III. These remedies, however, are not comparable to a suit against the employer in federal court. Judicial review under the APA typically involves suit against the Department of Labor, not the employer. Administrative enforcement can include an award of back pay from the employer, 41 C.F.R. § 60-1.26(a)(2), but this enforcement mechanism is nonjudicial. Neither remedy indicates congressional intent to permit suit against the employer in federal court, and thus neither supports removal jurisdiction under *Merrell Dow*.[2]

Only if the executive order provides Utley with a private right of action against Varian in federal court might his complaint raise

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[2] Although Varian does not argue the point, we note that the possible existence of a private right of action for Utley under the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-15(f)(1), does not mean that his state law causes of action arise under federal law: Utley's causes of action do not specifically invoke Title VII, and thus do not require resolution of any questions arising under it. The fact that the executive order program provides for the referral of complaints to the Equal Employment Opportunity Commission (EEOC) for proceedings under Title VII, Exec. Order No. 11,246 § 209(a)(3); 41 C.F.R. § 601.24(24)(a), does not alter this analysis. Any resulting private right of action would be grounded on Title VII, which Utley's state law causes of action do not invoke, and not on the executive order program itself.

a "substantial" federal question permitting removal jurisdiction. This is an issue of first impression in this circuit, which we address next.

III.

The cornerstone of the affirmative action program is its requirement that government contracting agencies provide in all nonexempted government contracts a clause that, among other things, prohibits contractors from discriminating on the basis of race and requires the contractors to take "affirmative action" to ensure that employees are hired without regard to race. Exec. Order No. 11,246 § 202; 41 C.F.R. § 60-1.4(a) *see also* 41 C.F.R. §§ 60-1.40 to -1.43, -2.10 to -2.14. -2.20 to -2.26, -3.1 to -3.16 (detailing affirmative action requirements). The executive order assigns to the Secretary of Labor the duty to enforce its provisions, Exec. Order No. 11,246 § 201, which the Secretary has delegated, *see id.* § 401 (permitting delegation of Secretary's duties), to the Office of Federal Contract Compliance Programs (OFCCP), 41 C.F.R. § 60-1.2. The OFCCP monitors program compliance reviews and investigation of employee complaints. Exec. Order No. 11,246 § 206; 41 C.F.R. §§ 60-1.20 to -1.24.

The program contains several enforcement mechanisms. First, the OFCCP may refer complaints to the EEOC for proceedings under Title VII of the Civil Rights Act of 1964. Exec. Order No. 11,246 § 209(a)(3); 41 C.F.R. § 60-1.24(a). Second, the OFCCP may, after making reasonable attempts to secure compliance "by methods of conference, conciliation, mediation, and persuasion," recommend to the Justice Department that it bring "appropriate proceedings," including those for injunctions, to redress "substantial or material" violations. Exec. Order No. 11,246 § (209)(a)(2), (b); *see also* 41 C.F.R. § 60-1.26(a)(2), (e) (implementing regulations permitting Attorney General to also bring suit in federal court for recovery of back pay). Finally, after making reasonable attempts at conciliation, the OFCCP may institute admintrative enforcement proceedings to cancel or suspend the contract and bar the contractor from future government work. Exec. Order No. 11,246 § 209(a)(5), (a)(6), (b); *see also* 41 C.F.R. § 60-1.26(a)(2) (regulations providing also for award of back pay). The regulations provide

that the Secretary may impose these administrative remedies only after the Solicitor of Labor conducts a hearing or the contractor waives it. 41 C.F.R. § 60-1.26(a)(2), (c), (d).

Neither the executive order nor the regulations *expressly* provides a private right of action in federal court to redress affirmative action violations. The district court found no private right of action *implicit* in the executive order, on the ground that a private right of action "would be obviously destructive of the administrative scheme' " established by the order. 625 F. Supp. at 107 (quoting *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. 871, 875-76 (N.D. Cal. 1975)).[3] We review the district court's decision construing the executive order *de novo. Cf. Trustees of Amalgamated Ins. Fund v. Geltman Indus.*, 784 F.2d 926, 929 (9th Cir. 1986) (*de novo* review for statutory interpretation), *cert. denied*, 107 S. Ct. 90 (1986).

Were the affirmative action program created by Congress, we would examine congressional intent to determine whether a private right of action should be inferred. *See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell*, 105 S.Ct. 3085, 3092-94 (1985); *Cort v. Ash*, 422 U.S. 66 (1975); *In re Mexico City Aircrash of October 31, 1979*, 708 F.2d 400, 406-08 (9th Cir. 1983). Because the executive has created the affirmative action program, a similar analysis, focusing on executive rather than congressional intent, is

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[3] Most courts that have considered the issue have found no implied private right of action under the executive order. *See, e.g., Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 822 n.4 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Weise v. Syracuse Univ.*, 522 F.2d 397, 411 n.23 (2d Cir. 1975); *Manuel v. International Harvester Co.*, 502 F. Supp. 45, 47-48 (N.D. Ill. 1980); *Traylor v. Safeway Stores, Inc.*, 402 F. Supp. at 874; *cf. Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632-33 (5th Cir.) (private action under predecessor of Exec. Order No. 11,246 would be inconsistent with its administrative enforcement scheme), *cert. denied*, 389 U.S. 977 (1967). *But see Lewis v. Western Airlines, Inc.*, 379 F. Supp. 684, 686-89 (N.D. Cal. 1974) (private action under Exec. Order No. 11,246 compatible with its administrative enforcement scheme).

appropriate in determining whether the executive order contemplates a private right of action.[4]

The Supreme Court in *Cort v. Ash* listed four factors relevant "[i]n determining whether a private remedy is implicit in a statute not expressly providing one":

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78 (citations omitted). Focusing on executive rather than legislative intent, we apply these factors to the executive order program.

The first *Cort* factor weighs in favor of inferring a private right of action. Utley is black, and the affirmative action program clearly seeks to secure equal opportunity in employment for minorities. Utley is thus a member of the class for whose "especial benefit" the program was created.

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[4] One, potentially critical, difference between the two forms of analyses is that the principle of separation of powers may require an executive-created action to be rooted in an appropriate grant of authority from Congress. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (principle of separation of powers requires any "substantive" regulation, " 'affecting individual rights and obligations,' " to be "rooted in a grant of [legislative] power by the Congress and subject to limitations which that body imposes"); *cf. Kuhn v. National Ass'n of Letter Carriers*, 570 F.2d 757, 760-61 (8th Cir. 1978) (Exec. Order No. 11,491 regulating federal labor-management relations is not "law" for purposes of 28 U.S.C. § 1331, because not congressionally authorized) (cited with approval in *Leath v. Stetson*, 686 F.2d 769, 771 (9th Cir. 1982)). Because we conclude below that Executive Order 11,246 provides no private right of action, we need not address the authorization issue.

The second factor, however, strongly cautions against finding a private right of action. The executive order and regulations provide no explicit indication that the executive intended to create such a remedy. Likewise, this court has found no executive statement expressing an unambiguous view on the subject.[5] We are left, then, to analyze the program to determine whether it implicitly indicates an executive intent to provide a private remedy.

We follow the "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19 (1979); *accord Mexico City Aircrash*, 708 F.2d at 407. The affirmative action program contains detailed enforcement procedures, including referrals to the EEOC and the Justice Department, and administrative proceedings for contract cancellation and recovery of back pay. This comprehensive enforcement mechanism creates a strong presumption that the executive deliberately omitted a private remedy from the program. *Cf. Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.") The Fifth Circuit in *Farkas* considered whether the predecessor of Executive Order 11,246—Executive Order 10,925—conferred a private right of action. The court found the existence of administrative enforcement procedures under the executive order, "its narrowly limited reference to judicial enforcement," and the opportunity to file complaints with the EEOC, evidenced an executive intent not to provide a private remedy. 375 F.2d at 633. The present affirmative action program

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[5] The proposed 1976 revisions to the implementing regulations expressly stated that the executive order did not confer a private right of action. Equal Employment Opportunity: Proposed Revisions and Redesignation of Regulations, 41 Fed. Reg. 40,340, 40,352 (1976). This statement was omitted from the final regulations. We decline to read tea leaves and infer from this omission an executive intent to create a private right of action, particularly in light of the following analysis.

even more strongly evidences such intent, for it explicitly provides for the adminstrative recovery of back pay in addition to the remedies available under the program considered in *Farkas*.

This lack of any indication of executive intent to provide a private judicial remedy would alone arguably support a finding that none was implicit in the executive order. *Cf. Mexico City Aircrash*, 708 F.2d at 408 (failure to satisfy second *Cort* factor indicates that no private right of action under statute should be inferred). Yet, if the latter two *Cort* factors are considered, this conclusion becomes even stronger. While equal opportunity in federal employment is not an area of law "traditionally relegated to state law," a private judicial remedy would not be particularly consistent with the "underlying purposes" of the affirmative action program. It is, of course, quite possible that private actions under the executive order would further promote the program's goal of equal employment opportunity for minorities in the workplace. However, as previously noted, the executive order envisions achievement of this goal through conciliation—not confrontation. Only after having made reasonable attempts at "conference, conciliation, mediation, and pursuasion" does the executive order direct the Secretary to resort to other enforcement methods. A private action against the employer for affirmative action violations could very well circumvent the Secretary's conciliation efforts, upsetting the administrative enforcement mechanism contemplated by the executive order. *Traylor v. Safeway Stores, Inc.*, 402 F.Supp. at 875-76.[6] This inconsistency with the affirmative action program's emphasis on conciliation further demonstrates the inappropriateness of inferring a private right of action under the executive order.

Our analysis of the *Cort* factors leads us to conclude that the executive did not intend a private judicial remedy to redress

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[6] This conflict between public and private enforcement is not present to the same degree in Title VII, because Title VII expressly provides a private right of action but limits the right to cases where the EEOC has been unsuccessful in achieving compliance. *See* 42 U.S.C. § 2000e-5(f)(1). The executive order program, which does not expressly address private actions in federal court, does not provide a comparable mechanism to reduce this conflict.

violations of Executive Order 11,246's affirmative action program. We therefore decline to interpret the executive order as providing a private right of action.[7] Because Utley possesses no private right of action under the executive order, his state claims' incorporation of it does not raise a "substantial" question of federal law under *Merrell Dow*, and the district court could not assume removal jurisdiction on this basis.

IV.

Varian lastly contends that Utley's causes of action, even though drafted as arising under state law, are "really federal law claims." Varian argues that the executive order preempts Utley's state law claims incorporating it and that the district court therefore could have assumed jurisdiction over the action under the "artful pleading doctrine."

The artful pleading doctrine is an exception to the long-standing rule that federal courts cannot assume federal question jurisdiction solely on the basis of federal law raised as a defense. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 931 (9th Cir.), *cert. granted*, 107 S. Ct. 455 (1986). In the preemption context it provides that " 'if a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.' " *Id.* at 932 (quoting *Franchise Tax Bd.*, 463 U.S. at 24).

The artful pleading doctrine involves the court's recharacterization of a state law claim as a federal one. *Williams*, 786 F.2d at 931 n.1, 932 n.2, 933; *Hunter v. United Van Lines*, 746 F.2d 635, 640 (9th Cir. 1984), *cert. denied*, 106 S.Ct. 180 (1985). This court has used this recharacterization to distinguish actions maintaining jurisdiction under the artful pleading doctrine from those involving only "ordinary" preemption raised as a defense, which does not itself support jurisdiction. *See Williams*, 786 F.2d at 932; *Hunter*, 746 F.2d at 641-43. From this fiction of recharacterization stems the prerequisite for invoking the doctrine that not only must the federal cause of action "completely preempt" the state cause of action, but it must also provide a "superseding remedy

[7] *Lewis v. Western Airlines, Inc.*, 379 F. Supp. 684 (N.D. Cal. 1974), is overruled to the extent it is inconsistent with this opinion.

replacing the state law cause of action," *Williams*, 786 F.2d at 932, for if no federal right of action exists under the preempting federal law, recharacterization of the plaintiff's state law claim as a federal claim is doctrinally impossible. *Id.* at 932 n.2; *Hunter*, 746 F.2d at 742-43. *But cf. Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768-70 (9th Cir. 1986) (applying artful pleading doctrine in nonpreemption context in which no analogous federal right of action existed).

Before analyzing the artful pleading doctrine's applicability to this case, we briefly address the doctrine's relationship to the jurisdictional analysis of the preceding sections (the *Merrell Dow* test). The two modes of analysis are coexistent, and federal question jurisdiction may be supported under either basis. *See Franchise Tax Bd.*, 463 U.S. at 14-27 (applying both modes of analysis to determine whether federal jurisdiction existed). While both analyses are similar in that under either the lack of a private remedy under the relevant federal law will frustrate jurisdiction,[8] they are not identical. Under *Merrell Dow* a federal question is potentially raised by the state law cause of action's express incorporation of federal law. The artful pleading doctrine, on the other hand, asks whether the state law cause of action is properly recharacterized as a federal cause of action because a federal law, not necessarily expressly incorporated by the state law cause of action, preempts it. Even though a state law cause of action may not expressly raise a "substantial" federal question, jurisdiction may still be established under the artful pleading doctrine.

Having found that Utley's state law claims' express incorporation of the executive order does not raise a substantial federal question, we must then consider whether jurisdiction could be supported under the artful pleading doctrine. *See Shaw v. California Dep't of Alcoholic Beverage Control*, 788 F.2d 600, 603 (9th Cir. 1986) (district court's judgment may be affirmed on any basis supported by the record even if district court did not rely on

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[8] Under *Merrell Dow*, because the congressional intent not to provide a private right of action dictates that the federal question expressly raised by the state law claim is not "substantial"; under the artful pleading doctrine because without a federal right of action recharacterization of the state law claim as a federal claim is impossible.

that basis). Varian's sole argument is that Executive Order 11,246 preempts Utley's state law claims, which should therefore be recharacterized as arising under the executive order. The executive order, however, does not provide a private right of action in federal court. Nor does the administrative relief available to Utley under the executive order qualify as a "superseding" remedy for purposes of the artful pleading doctrine. The superseding federal remedy must provide a right of action *in federal court*; otherwise the federal court would be unable to take jurisdiction over the state law cause of action by recharacterizing it as a federal court action. We need not decide whether the executive order "completely preempts" Utley's state law causes of action, because, without an existing federal right of action, recharacterization of Utley's state law claims as an action under Executive Order 11,246 is impossible.

Finally, although Varian does not make the argument, we note that Utley's state law claims are not properly characterizable under the artful pleading doctrine as Title VII claims. While Title VII does provide a private right of action, it does not preempt Utley's state law claims. *See California Fed. Sav. & Loan Ass'n. v. Guerra*, 107 S. Ct. 683, 690-91, 695 (1987) (preemptive reach of Title VII is narrow, limited to state statutes that are inconsistent with or unlawful under Title VII); 42 U.S.C. §§ 2000e-7, 2000h-4. Therefore, the district court could not take jurisdiction of this action under the artful pleading doctrine.

V.

We conclude that the district court did not have jurisdicition over this action. We therefore do not address the preemption or abstention issues. The judgment of the district court is REVERSED and the action REMANDED. The district court is directed to remand the entire action to the Superior Court of the State of California for the County of San Mateo.

2. Order of the Ninth Circuit Court of Appeals Amending Opinion, April 7, 1987.

ORDER

[Filed April 7, 1987]

The opinion filed March 3, 1987 is amended as follows:

1. On page 7, in the last paragraph, delete " . . . expressly rejected finding federal question jurisdiction based on the relationship between the federal question and the state claim. 106 S.Ct. at 3237 n.15. The Court instead . . . "

2. On page 8, in the first line, replace "*Id.*" with "106 S.Ct. . . . "

3. Order of the Ninth Circuit Court of Appeals Denying Petition for Rehearing and Rejecting Suggestion for a Rehearing En Banc.

United States Court of Appeals
for the Ninth Circuit

United States Court of Appeals
for the Ninth Circuit

No. 85-2724

DC No. C-85-2128 EFL

Milton Utley,
Plaintiff-Appellant,

vs.

Varian Associates, Inc.,
Defendant-Appellee.

ORDER
[Filed April 23, 1987]

Before: CHAMBERS, NELSON, and WIGGINS, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

Order of the United States District Court for the Northern District of California Granting Partial Summary Judgment and Remanding, September 26, 1985.

United States District Court
Northern District of California

No. C-85-2128 EFL

Milton Utley,
Plaintiff,

v.

Varian Associates, Inc., et al,
Defendants.

Order Granting Partial Summary Judgment and Remanding

[Filed Sept. 26, 1985]

This action arises from the allegedly wrongful termination of plaintiff Milton Utley by defendant Varian Associates, Inc., EIMAC division. While the underlying facts are relatively unimportant to the disposition of the motions presently before the Court, it is significant that defendant Varian Associates, Inc. is a contractor for the federal government.

Suit was originally brought in San Mateo Superior Court with plaintiff alleging five separate counts arising from the allegedly wrongful termination. Because plaintiff's first, fourth and fifth counts implicate federal law, the case was removed to this Court. Defendant has moved the Court to dismiss part of the first and all of the fourth and fifth counts and, because such dismissals would eliminate any issues of federal law, to then remand the case to state court. Plaintiff contends that the case should be remanded immediately without any action being taken on the first, fifth, or fourth counts. He argues that removal was improper because none of the five claims "arises under" federal law as required by 28 U.S.C. section 1331.

At hearing both parties stipulated that if the Court were to dismiss the fifth count and that part of the first count implicating federal law, plaintiff would dismiss the fourth count. In light of that stipulation and the conclusions reached here, this order will not address any aspect of the fourth count which alleges misrepre-

sentations by defendant regarding its execution of affirmative action obligations pursuant to Executive Order No. 11246.

This order will first resolve plaintiff's jurisdictional objections before examining defendant's arguments for partial summary judgment.

JURISDICTION

By the terms of 28 U.S.C. section 1441(a) this case was properly removed from state court only if this Court would have had jurisdiction over it had it been filed here originally, *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n.* 656 F.2d 1364, 1365 (9th Cir. 1981), *cert. denied,* 455 U.S. 1020 (1982). Because there is no hint or contention that diversity or any other basis for federal jurisdiction is applicable, this case must satisfy the requirements of 28 U.S.C. section 1331 as a "civil action arising under the Constitution, laws or treaties of the United States" in order to be within this Court's jurisdiction.

The standard this Court must apply for determining whether a claim in this case "arises under" federal law is that articulated by the Ninth Circuit in *Guinasso:*

> A suit arises under federal law within 28 U.S.C. § 1331 if the complaint, properly pleaded, presents a substantial dispute over the effect of federal law, and the result turns on the federal question. . . . A substantial proposition of federal law must form 'a direct and essential element of plaintiff's cause of action.'

656 F.2d at 1365-66 (citations omitted).

Application of this standard to plaintiff's case compels the conclusion that jurisdiction is proper. Plaintiff's first count alleges in part that defendant violated California Government Code section 12940, the California Fair Employment and Housing Act ("CFEHA"), through conduct that violated obligations imposed on it as a federal government contractor under Executive Order No. 11246. Plaintiff's fifth count alleges that defendant violated section 17200 of the California Business and Professions Code ("section 17200") through the same conduct which is said to violate duties created by Executive Order No. 11246.

Executive Order No. 11246, issued in 1965 by President Johnson, requires federal government contracting agencies to

include certain nondiscrimination and affirmative action programs in all contracts they enter into with the federal government. The requirements are detailed in rules found in 41 C.F.R. sections 60-1.1 through 60-60.8 (1984). Thus, resolving count five and part of count one will require the Court to determine whether federal law created a duty, and if it did, the nature of that federal duty and whether defendant's conduct constituted a breach of that duty. The case is, therefore, a clear example of "a substantial dispute over the effect of federal law" where "the result turns on the federal question," *Guinasso,* 656 F.2d at 1365-66.

PARTIAL SUMMARY JUDGMENT

For plaintiff to prevail on count five and on part of count one, the breach of a federal duty to implement affirmative action plans would have to be cognizable as a violation of CFEHA and section 17200. Plaintiff has urged this Court to abstain from deciding whether such an interpretation of California law is warranted so that a California court may first address the issue. Because these motions can be decided without resolving questions of California law, the invitation to abstention is declined. The Court rules that even if breach of a federal duty were cognizable under CFEHA or section 17200, remedies under state law would be preempted by the remedial scheme prescribed by federal law in 41 C.F.R. sections 60-1.20 through 60-1.34 (1984).

Preemption of state law by federal law is authorized by the Supremacy Clause of the Constitution which makes the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . the supreme Law of the Land," U.S. Const. Art. VI, cl.2. "Federal regulations have no less preemptive effect than federal statutes." *Fidelity Federal Sav. & Loan Assn. v. De La Cuesta,* 458 U.S. 141, 153 (1981).

Preemption may be compelled either by explicit language in the federal law or by implication from the law's structure and purpose. *Id.* at 152-53 citing *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). In this case it is the structure and purpose of the law—as manifested by the comprehensive remedial scheme in 41 C.F.R. §§ 60-1.20 through 60-1.34—that compels preemption.

In cases involving the National Labor Relations Act ("NLRA") the Supreme Court has made clear that a compre-

hensive federal program of administrative remedies compels preemption of state laws attempting to create additional remedies. In *San Diego Unions v. Garmon,* 359 U.S. 236 (1958) the Court ruled that a state court was precluded by the NLRA from awarding damages under state law to employers for injuries resulting from peaceful picketing. The Court reasoned that allowing the state to grant a remedy withheld from the National Labor Relations Board would "accentuate the danger of conflict [with federal policy]." *Id.* at 247. In *Motor Coach Employees, etc. v. Lockridge,* 403 U.S. 274 (1971) (holding that an employee's claim against a union for wrongfully interfering with the relationship between him and his employer was preempted by the NLRA) the Court said, "[t]he constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." 403 U.S. at 285-86. More recently, Judge Zirpoli wrote for this court that "[t]he purpose of the preemption doctrine, as *Lockridge* makes clear, is to avoid conflicting *remedies,* as well as the conflicting application and interpretation of substantive rules of law." *Milk Drivers and Dairy Employees Union v. Vevoda,* 587 F. Supp 483, 485 (N.D. Cal. 1984) (emphasis in original).

The question of whether or not a remedy awarding damages to private plaintiffs is compatible with the federal administrative scheme established to enforce Executive Order No. 11246 has already been answered in the negative by this and other courts ruling that there can be no private right of action under Executive Order No. 11246. Judge Renfrew has explained that the order "establishes a plethora of adminstrative procedures and remedies,"[1] and that "[i]t would be obviously destructive of the

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[1] The Office of Federal Contract Compliance Programs ("OFCCP") can refer complaints to the Equal Employment Opportunity Commission for processing under Title VII of the Civil Rights Act of 1964, 41 C.F.R. § 60-1.24(a) (1984); "OFFCP may institute an administrative enforcement procedure to enjoin . . . violations, to seek appropriate relief (which may include affected class and back pay relief) and to impose appropriate sanctions," 41 C.F.R. § 60-1.26(a)(2) (1984); OFFCP may refer a matter to the Department of Justice and the Attorney

administrative scheme to allow it to be short-circuited by implying a private right of action in favor of individuals who feel that they have been injured through noncompliance with Executive Order 11246." *Traylor v. Safeway Stores, Inc.*, 402 F. Supp 871, 875, 876 (N.D. Cal. 1975); *see also Farkas v. Texas Instruments, Inc.*, 375 F.2d 629, 633 (5th Cir. 1967), *cert. denied*, 389 U.S. 977 (1967).

While technical distinctions between implying a private federal right of action based on an executive order and allowing an executive order to be the basis of a suit for a violation of state law might exist,[2] it would be a distinction without a difference in this context. The effect of either is to allow "short-circuiting" the remedial scheme promulgated under Executive Order No. 11246. The Supremacy Clause makes clear that when the short-circuiting is of a federal law by a state law that state law is preempted.

Plaintiff's citation to *Allen-Bradley Local No. 1111 v. Wisconsin Emp. Rel. Board*, 315 U.S. 740 (1942) for the proposition that "the existence of comprehensive federal law in the employment-labor relations field does not preclude a state from acting"(Pl. Reply at 3) overlooks more than forty years of developments in the doctrine of preemption. Subsequent decisions such as *Garmon* and *Lockridge* indicate that state laws will be preempted when they attempt to provide remedies not provided in a comprehensive federal administrative scheme. The vitality of *Allen-Bradley* persists as an example of an exception to the preemption doctrine when a state is acting to protect "such traditionally local

---

General "may bring a civil action . . . requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional equitable relief, including back pay, deemed necessary or appropriate to ensure the full enjoyment of the rights secured by . . . [Executive Order No. 11246]," 41 C.F.R. § 60-1.26(e) (1984); the Attorney General may also initiate suit without being referred by OFFCP, 41 C.F.R. § 60-1.26(f) (1984).

[2] *See*, Note, *State Incorporation of Federal Law: A Response to the Demise of Implied Rights of Action*, 94 Yale L.J. 1144 (1984) (Arguing that where, unlike here, denying a private right of action is based on the "negative implication" that congress intended no such right since it was silent on the issue, it would be appropriate for state law to incorporate federal law.)

matters as public safety and order and the use of streets and highways," *Farmer v. Carpenters*, 430 U.S. 290, 299 (1976) (quoting *Allen-Bradley* at 749). However, this case does not involve a powerful state interest justifying an exception to the preemption doctrine. Here the conduct involved is alleged to be a breach of a federal duty arising from defendant's status as a contractor with the federal government; the state's interest in enforcing such a duty is minimal.

The conclusion reached here is consistent with the decisions of California courts that have addressed the question of whether section 17200 can be a springboard for suits when a federal duty is breached. In *People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.*, 38 Cal. 3d 509, 523 (1985) the court was faced with the contention that the defendants violated the federal Highway Beautification Act, 23 U.S.C. §§ 131, 135, 136, 319, and could therefore be enjoined from committing unfair competition in violation of section 17200. The court disallowed the injunction on the grounds of preemption concluding that the federal Department of the Interior rather than the state Department of Transportation was the appropriate agency to enforce the provisions of the Highway Beautification Act. *Id.* at 523.

Similarly, in *Diaz v. Kay-Dix Ranch*, 9 Cal. App. 3d. 588 (1970) migrant farm workers sought an injunction prohibiting ranch owners from knowingly employing illegal aliens. The workers alleged that such conduct was unfair competition in violation of the predecessor of section 17200. The court denied the injunction on grounds of preemption stating "[i]t is more orderly, more effectual, less burdensome to the effected interests, that the national government redeem its commitment [implied by national immigration policy]." *Id.* at 599.

While the present case differs from these two California cases in that compensatory rather than injunctive relief is being sought here, the Court believes they support the conclusion that the creation of additional remedies under the broad language of section 17200 is preempted when a detailed federal enforcement mechanism for the breach of an obligation created by federal law exists.

It is ordered, therefore, that the first count be dismissed to the extent that it is based on a breach of federal duty. The fifth count

is dismissed in its entirety as is the fourth count pursuant to the parties' stipulation in open court. The case is remanded to the San Mateo Superior Court.

IT IS SO ORDERED.

Date: September 26, 1985.

/s/ EUGENE F. LYNCH
Eugene F. Lynch
United States District Judge

Supreme Court, U.S.
FILED
JUL 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 86-1945

In The
Supreme Court of the United States
October Term, 1986

VARIAN ASSOCIATES, INC.,
Petitioner,

vs.

MILTON UTLEY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an employee files an action in a state court for wrongful discharge growing out of violations of state statutory and common law and seeks to incorporate into the state law the employer's status as a federal contractor with affirmative action obligations under a federal executive order which does not create a private cause of action, can the case be removed to a federal court on the basis of "arising under" federal-question jurisdiction?

Respondent opposes the granting of the writ; however, if the writ is granted, respondent requests that the Court consider the following questions:

2. When Congress, in enacting Title VII of the Civil Rights Act of 1964, has expressly indicated that an employee subject to discrimination may pursue state remedies and when courts have recognized that Executive Order No. 11246 can be incorporated into other statutes, are claims based on the incorporation by reference of the executive order into the California Fair Employment and Housing Act, relating to job discrimination, and the California Unfair Competition Act preempted by federal law?

3. When California has enacted a comprehensive statutory scheme to deal with job discrimination that has been interpreted by the California courts to provide broader remedies than the comparable federal legislation under Title VII of the Civil Rights Act of 1964, when California has a statute against unfair competition, and when no California court has decided whether a claim for racial discrimination in violation of an affirmative action obligation

imposed on an employer under a federal executive order can create a cause of action under either of these California state statutes, did the District Court properly refuse to abstain from exercising federal jurisdiction and to remand the case to the state courts?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent Milton Utley ("Utley") objects to the portion of the Statement of the Case of petitioner Varian Associates, Inc. ("Varian") in which Varian asserts that Utley's amended complaint is predicated on the theory that Varian was obligated to allow Utley to displace a non-minority employee and that Utley's right to recover "hinged completely upon whether the executive order and its regulations required the specified conduct and upon whether Varian complied with those requirements." (Petition, pp. 3-4.) There is no such allegation in the amended complaint, and Utley's theories are that because Varian was a government contractor with affirmative action obligations, under California law any proposed management decisions by Varian had to be made with affirmative action obligations in mind, or that Varian was required to have made a greater effort than it did to retain Utley or to find him another position in another facility or division of Varian. Because Varian removed the case from the state court before Utley has completed his discovery, Utley is not now in a position to articulate fully all of his theories.

Utley disagrees with Varian's interpretation of the opinion of the Court of Appeals, in that contrary to the assertion of Varian, the Court of Appeals did not "agree" that the affirmative action claims were predicated "solely" on Varian's alleged violation of federal law and that they necessarily turned on the resolution of the federal question. (Petition, p. 5.) Although the Court of Appeals acknowledged that Utley's state claims are based on

Varian's alleged violation of federal law, it did not conclude that the claims were predicated "solely" on this alleged violation or that the claims "necessarily" turn on the resolution of the federal question.

REASONS FOR DENYING THE WRIT

This Court should deny the petition because the decision of the Court of Appeals correctly interpreted the decisions of this Court on federal-question jurisdiction, and there is no real threat to the uniformity of application and the integrity of administrative procedures established under federal law. Moreover, there is no conflict between the decision of the Ninth Circuit and one in another circuit.

ARGUMENT

I. THE NINTH CIRCUIT PROPERLY INTERPRETED THIS COURT'S DECISION IN MERRELL DOW.

Varian has misread the majority opinion of this Court in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, — U.S. —, 106 S.Ct. 3229 (1986), which was interpreted properly and followed by the Court of Appeals. The majority opinion in *Merrell Dow* declined to recognize a species of "arising under" jurisdiction in cases in which a plaintiff seeks in a state court private cause of action to incorporate a federal standard when Congress had intended that there not be a federal private action for vio-

lations of that federal standard. The majority of this Court in *Merrell Dow* refused to interpret *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), as establishing rigid formulas for the determination of "arising under" jurisdiction. The majority initially observed:

> As was true in *Franchise Tax Board, supra,* the propriety of the removal in this case thus turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts. There is no 'single, precise definition' of that concept; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.' [*Franchise Tax Board*, 463 U.S. 1, 8.]
>
> (— U.S. —, —, 106 S.Ct. 3229, 3232 (1986).)

Considering a determination whether "arising under" federal jurisdiction is conferred when a plaintiff in a state court seeks to incorporate certain federal standards, the majority in *Merrell Dow* were concerned with the policy considerations involving the proper allocation of judicial resources and the due regard for federal-state relations. Later in the opinion, the majority noted:

> Far from creating some kind of automatic test, *Franchise Tax Board* thus candidly recognized the need for careful judgments about the exercise of federal judicial power in an area of uncertain jurisdiction. Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. This conclusion is fully consistent

> with the very sentence relied on so heavily by the petitioner. We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction.
>
> (— U.S. —, —, 106 S.Ct. 3229, 3235-36 (1986).)

As the majority opinion amplified in footnote 12, the importance of the nature of the federal issue in federal-question jurisdiction is of significance in determining the existence of federal jurisdiction. The reference to a federal statute or, as in this case, an executive order in a situation in which no private right of action can be implied does not create the type of federal issue in a state cause of action that confers federal-question jurisdiction.

As in the Court of Appeals, Varian has mischaracterized the "federal question." Utley has sued under two California statutes: the California Fair Employment and Housing Act, California Government Code § 12940, which prevents an employer from discharging or discriminating against an employee because of race, and California Business and Professions Code § 17200, which prevents unlawful business practices. The gravamen of Utley's claim is that because Varian, as a federal contractor, had affirmative action duties under Executive Order No. 11246, 30 Fed.Reg. 12319 (1965), *reprinted in* 42 U.S.C. 2000e app. at 28-31 (1982), and its implementing regulations, 41 C.F.R. ch. 60 (1985), a California court, in interpreting the California statutes, can establish, as a matter of California law, the nature and extent of Varian's affirmative action obligations and can decide whether Varian's con-

duct violated the California statutes. The California court need not interpret the regulations and decide that Varian violated a specific federal regulation. The status of Varian as an "equal opportunity employer" with affirmative action obligations can create duties under the California statutes different from those imposed on an employer with no "affirmative action" obligations.

Varian also has overstated Utley's contentions concerning affirmative action. Contrary to Varian's suggestion, Utley has not contended, in his amended complaint or in any of the formal discovery documents, that Varian is liable to him because Varian did not "allow him to displace a non-minority employee." (Petition, p. 3.) Utley essentially contends that because he was an employee of a federal contractor which had an affirmative action obligation under the executive order, Utley had a protected status analogous to that of an employee of contractors with the State that is recognized by California Government Code § 12990.

In addition, Varian has misinterpreted and mischaracterized the requirement in the majority opinion in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* — U.S. —, 106 S.Ct. 3229 (1986), of the existence of a private right of action in federal court as a precondition for "arising under" jurisdiction by suggesting that certain administrative remedies—obviously, including those provided by the implementing regulations to Executive Order No. 11246—are tantamount to a "federal cause of action," "private federal remedy," "federal private cause of action," "federal remedy," and "private federal cause of

action''—terms mentioned by the majority in *Merrell Dow*. (Petition, p. 10.) *McMahon v. United States,* 186 F.2d 227, 230 (3d Cir. 1950), cited by Varian, does not support the analysis. *McMahon* involved a suit in admiralty under the Suits in Admiralty Act and the Clarification Act which expressly provided for suit after a claim was administratively disallowed in whole or in part. Moreover, Varian conveniently has ignored, that the Federal Food, Drug, and Cosmetic Act (''FDCA''), 52 Stat. 1040, as amended, 21 U.S.C. §§ 301 *et seq.* (1982 ed. Supp. II), which was involved in *Merrell Dow,* has an administrative enforcement scheme, including the authority of the FDA to obtain an ex parte court order for the seizure of goods, the authority to initiate proceedings in court to enjoin continuing violations of the FDCA, and the authority to request a United States Attorney to bring criminal proceedings against violators. *Merrell Dow,* — U.S. —, 106 S.Ct. 3229, 3244 (1986) (Brennan, J., dissenting). If the existence of this administrative enforcement scheme was not sufficient in *Merrell Dow* to confer ''arising under'' jurisdiction, the existence of the administrative enforcement scheme under Executive Order No. 11246 similiarly should not create jurisdiction in this case.

II. THE DECISION OF THE COURT OF APPEALS DOES NOT PRESENT A CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

Varian has contended incorrectly that the decision of the Ninth Circuit conflicts with *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert. denied* 389 U.S. 977 (1967). *Farkas* did not involve the removal of an action from a state court, but rather was an action

that initially was filed in a federal court, unsuccessfully asserting the existence of a private federal civil action for violation of the predecessor to Executive Order No. 11246. A careful reading of the majority opinion in *Merrell Dow* indicates that the policy considerations for the exercise of "arising under" jurisdiction differentiate the exercise of removal federal-question jurisdiction from federal-question jurisdiction in actions filed originally in a federal district court.

The decision of this Court in *Bell v. Hood*, 327 U.S. 678, 682 (1946), similarly involved a case originally filed in a federal district court.

III. ANY FEDERAL INTEREST IN THE INTERPRETATION OF THE EXECUTIVE ORDER IS PRESERVED ADEQUATELY.

Varian has contended that federal jurisdiction should be recognized in order to insure uniformity of application of the administrative scheme and to utilize the expertise of federal courts in interpreting and applying federal law. (Petition, pp. 13-17.) This argument was expressly rejected by the majority in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, — U.S. —, 106 S.Ct. 3229, 3236-37 (1986), on the ground that the argument is more properly that of pre-emption, which can be raised in the state courts with ultimate review in this Court.

———o———

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

HERBERT WILLIAM YANOWITZ
Attorney for Respondent

Dated: June 30, 1987

Of Counsel:

GERARD J. HINCKLEY

No. 86-1945

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AUG 7 1987
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

VARIAN ASSOCIATES, INC.
Petitioner,

VS.

MILTON UTLEY,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Varian Associates, Inc., submits the following reply brief in support of its petition for a writ of certiorari.

I

PLAINTIFF'S EXECUTIVE ORDER CLAIMS WERE BASED SOLELY UPON PETITIONER'S ALLEGED VIOLATION OF EXECUTIVE ORDER 11246 AND ITS IMPLEMENTING REGULATIONS, WITH STATE LAW SIMPLY PROVIDING AN ADDITIONAL REMEDY

In his opposition to Varian's petition for certiorari, Respondent seeks to leave the impression that his executive order claims were not based upon violations of the executive order's obligations, but simply included a "reference" to the executive order, upon which supplemental state claims and remedies might be formulated. (Resp. Br. at 4) In the course of doing so, he takes issue with Varian's characterization of his claims as claims based upon, and existing solely by virtue of, Varian's alleged violation of its obligations under Executive Order 11246 and its implementing regulations. Respondent's argument, however, is contrary to the allegations of his complaint, the briefs he filed below, the decision of the district court, and the findings and assumptions of the Ninth Circuit.

The First Amended Complaint, in which the subject claims were raised, directly contradicts Respondent's inference. In the first cause of action, Respondent alleged that Varian, "in failing and refusing to rehire or find alternative employment for the plaintiff . . . violated . . . the requirements and obligations imposed upon the said defendant as a government contractor with the United States of America under affirmative action programs established by Executive Order No. 11246 and its implementing regulations, 41 CFR §§ 60-1.1 et seq., and, *as such,* violated California Government Code § 12940." (emphasis added) In his unlawful business practice claim, Respondent expressly incorporated this allegation and further alleged that "said conduct of

defendants, and each of them, amounted to an unlawful, unfair, or fraudulent business practice within the purview of Business and Professions Code § 17200." In his misrepresentation claim, Respondent alleged that Varian had represented that it "had and would continue to carry out an affirmative action program that complied with the requirements of Executive Order 11246 and its implementing regulations," but that "defendants and each of them had not complied fully with their obligations for an affirmative action program, and . . . did not intend to comply fully with the requirements for such a program," thereby subjecting them to liability.

Thus, Respondent expressly based his claims upon Varian's alleged violation of its federal obligations, without reference to independent state requirements, and was using the state statutes solely to supplement his federal remedies for these violations. As this Court held in *Franchise Tax Board v. Laborers' Vacation Trust,* 463 U.S. 1, 10 (1983), whether a case arises under federal law "must be determined from what necessarily appears in the plaintiff's statement of his own claim. . . ."

The nature of plaintiff's claims also was clearly expressed by Respondent's attorney in the briefs he filed in support of his motion for leave to file the First Amended Complaint, his brief before the district court, and his brief before the Ninth Circuit. In a declaration filed in support of a motion to continue Petitioner's summary judgment motion in the state court, Mr. Yanowitz explained that he desired to file an amended pleading "to present the theory that the defendant had failed to meet its obligations to minorities under the regulations governing contractors with the federal government and [to] assert that this failure created a state cause of action." He repeated this allegation in his declaration and brief in opposition to Petitioner's summary judgment motion. In his brief in support of Respondent's motion for leave to file the First Amended Complaint, he defended the viability of the executive order claim by stating, "The violation of the requirements of Executive Order No. 11246 and 41 C.F.R. §§ 60-1.1 et seq. should form the basis of liability under Government Code § 12940. . . ."

In the "Statement of the Case" portion of his opening brief in the district court, Respondent explained his executive order claims as follows:

> "The plaintiff, a black, alleges that defendant violated California Government Code § 12940, the California Fair Employment and Housing Act, in that the conduct of the defendant in placing him on lay-off status and in failing and refusing to rehire or find alternative employment . . . violated . . . the affirmative action obligations imposed upon the defendant as a federal government contractor under Executive Order No. 11246 and its implementing regulations."

Plaintiff's complaint, and his brief and argument before the district court, led the district court to conclude, in a finding not contested by the Ninth Circuit, that resolving the executive order causes of action "will require the court to determine whether federal law created a duty, and if it did, the nature of that federal duty and whether defendant's conduct constituted a breach of that duty. The case is, therefore, a clear example of a 'substantial dispute over the effect of federal law' where 'the result turns on the federal question.' . . ." (Appendix B, at A-18)

The Ninth Circuit itself specifically stated that "Utley's state claims are based on Varian's alleged violation of federal law." (Appendix A, at A-4) It also noted without disagreement Varian's contention that a determination of liability on these claims would require resolution of the issue of Varian's compliance with its federal affirmative action obligations, but rejected Varian's contention that this necessary resolution of a substantial federal question mandated a conclusion that the claims arose under federal law. *Id.* at A-4.

Thus, Respondent's present effort to leave with this Court the impression that his executive order claims simply referred to Varian's status as a federal contractor, without reference to or reliance upon the requirements of the executive order and its implementing regulations, is directly contrary not only to the specific allegations of his complaint, but also to his attorney's arguments in support of the claims at each stage of the litigation. It also conflicts with the district court's and the Ninth Circuit's

characterization of the claims. As the district court held, and the Ninth Circuit did not dispute, Respondent's claims were premised solely upon Varian's federal affirmative action obligations and its alleged failure to comply with those obligations. No independent obligations under state law ever have been cited or relied upon by Respondent, and the role of state law in his executive order claims was simply to adopt the federal requirements and to provide supplemental remedies. Respondent's claims necessarily would rise or fall based upon the question of whether Varian complied with its federal obligations.

In any event, how Respondent now casts his claims is largely beside the point for purposes of the present petition. The Ninth Circuit held that Respondent's state claims were based upon Varian's alleged violation of federal law. It also assumed for purposes of its ruling that the claims necessarily would require resolution of the issue of Petitioner's compliance with its federal obligations. It is the Ninth Circuit's subsequent ruling that these assumed facts are irrelevant for federal question jurisdiction purposes that Petitioner asks this Court to consider. In so ruling, the Ninth Circuit significantly restricted the federal question jurisdiction of the federal courts, essentially ignored this Court's rulings in *Franchise Tax Board v. Laborers' Vacation Trust*, 463 U.S. 1 (1983) and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and dramatically expanded this Court's ruling in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, ___ U.S. ___, 106 S.Ct. 3229 (1986). In this respect, the Ninth Circuit's decision, and the significance of its implications for federal practice generally, justify this Court's issue of a writ of certiorari in the matter. On these points, Respondent's brief is largely silent.

II

THE NINTH CIRCUIT'S DECISION WILL IMPAIR SIGNIFICANT FEDERAL INTERESTS IN THE INTEGRITY OF THE EXECUTIVE ORDER'S ADMINISTRATIVE REMEDIAL SCHEME

Respondent also argues that ensuring the integrity and uniformity of application of an administrative remedial scheme was

"expressly rejected" in *Merrell Dow* as a basis for determining whether federal jurisdiction should be recognized over a state law claim based upon the violation of a federal statute. (Resp. Br. at 7) He further states that the federal Food Drug and Cosmetic Act (FDCA) (the statute involved in *Merrell Dow*) also had an administrative enforcement scheme, arguing that, if the existence of that enforcement scheme was not sufficient to confer "arising under" jurisdiction, the enforcement scheme under Executive Order 11246 "similarly should not create jurisdiction in this case." (Resp. Br. at 6)

Both arguments are erroneous, and both ignore the fact that the administrative enforcement scheme established by Executive Order 11246 includes a remedial scheme by which individuals can be compensated for damages incurred because of an employer's violation of its affirmative action obligations. This fact alone constitutes a significant difference between the administrative scheme considered in *Merrell Dow* and the executive order involved in this case.

Contrary to Respondent's argument, the majority opinion in *Merrell Dow* did not reject uniformity of interpretation and application of federal law as a basis for the assumption of federal question jurisdiction. The Court only held that the federal interest in uniformity, standing alone, was not sufficiently significant to warrant federal jurisdiction over a claim in which the federal standard is merely "an element of" an independent state law standard and thus is not dispositive on the question of liability. The Court explained that any misinterpretation or misapplication in such a setting significant enough to impair the marginal federal interest could be corrected by the Supreme Court.

A very different situation is presented, however, when the federal statute or regulation establishes a specific regulatory scheme and enforcement mechanism and provides individuals with specific remedies for violations of the statutory or regulatory requirements. In the latter case, the federal interest in a uniform interpretation of obligations, and in the integrity of the federal remedial scheme, provide a far greater federal interest and establish a much greater risk of impairment if independent state proceedings and remedies based upon violation of the statute or

regulation are allowed. It was the *absence* of such individual federal remedies that this Court cited in *Merrell Dow* and *Moore v. Chesapeake & Ohio Railway*, 291 U.S. 205, 215 (1934), when it ruled that inclusion of a federal statutory standard as an element of a state negligence claim is not sufficient to create federal question jurisdiction.

Respondent's argument that the administrative enforcement scheme established by the FDCA is comparable to the enforcement scheme under Executive Order 11246 (Resp. Br. at 6) is incorrect. In enacting the FDCA, Congress purposefully eliminated a proposed provision establishing individual federal remedies in deference to already existing state remedies.[1] The Act therefore does not provide *any* private or public remedies on behalf of individuals for harm suffered due to a manufacturer's violation of the statutory requirements. Under Executive Order 11246 and its implementing regulations, however, private remedies *are* available. Individuals are entitled to file administrative claims for relief, and the Department of Labor itself is able to obtain relief on behalf of individual employees for an employer's violation of its obligations. In other words, the "private federal remedy" that this Court noted *Merrell Dow* was lacking under the FDCA in fact exists under Executive Order 11246. The Ninth Circuit itself noted that this federal remedial scheme would be significantly impaired if private judicial actions, and supplemental judicial remedies, were recognized. (Appendix A, at A-10)

Thus, the private remedial scheme established by Executive Order 11246 and its implementing regulations constitutes a significant difference between the present case and the situation that existed in *Merrell Dow*. The Ninth Circuit's decision, although noting the difference, essentially rules that federal remedial schemes in federal courts are of greater significance, and are deserving of greater protection, than federal remedial schemes before administrative agencies. No explanation for this distinction between federal interests and federal choices of remedial schemes is given beyond an unexplained citation to *Merrell Dow*. As

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[1] See discussion and authorities at footnote 2 of the Respondent's brief in *Merrell Dow*.

pointed out in Petitioner's opening brief, however, *Merrell Dow* does not support any such distinction, and in fact appears to reject it, focusing instead on the absence of a "federal remedy", not the "private right of action in federal court" standard adopted by the Ninth Circuit. 106 S.Ct. at 3235-36.[2]

Furthermore, if each state were able through its legislature or courts to impose its own version of a federal contractor's affirmative action obligations, or to provide its own set of remedies for the contractor's violation of its contractual obligations as so defined, no federal contractor would be able to know from one state to the next precisely what its obligations as a federal contractor were. The obligations imposed by virtue of federal contractor status could vary from one state to the next, and the obligations imposed by one state could conflict with the obligations imposed by another, or even with the obligations imposed by the regulations of the Department of Labor. The potential liabilities of a contractor also would far exceed those imposed by the Executive Order itself. The federal interest in conciliation and voluntary compliance easily could be impaired or subverted by individual states' preferences for litigation and a broader range of remedies.

All of these considerations led the district court and the Ninth Circuit, and all other courts that have considered the question, to conclude that private judicial remedies to enforce Executive Order 11246 would conflict with federal interests and impair the integrity of the executive order's remedial scheme. By then deciding that this ruling "perforce" precluded the exercise of federal jurisdiction under 28 U.S.C. § 1331, the Ninth Circuit in essence sanctioned the very impairment of federal interests that it held would result if judicial claims were allowed to proceed.

In conclusion, the Ninth Circuit's decision that individual remedies provided by a federal statute must exist *in federal court* as opposed to other federal forums before federal question jurisdiction attaches under § 1331 is not supported by *Merrell Dow* or

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[2] Indeed, because administrative remedies often are more limited than judicial remedies, it would appear that such remedial schemes should receive *greater* protection, not less.

any other decision of this Court. It directly conflicts with this Court's decisions in *Franchise Tax Board* and *Smith*. If allowed to stand, it would significantly restrict the "arising under" jurisdiction of the federal courts and could impair significant federal interests under Executive Order 11246 and its implementing regulations. These significant federal interests justify this Court's consideration of the issue at this time.

III

THE JURISDICTIONAL RULINGS OF THE NINTH CIRCUIT CONFLICT WITH THE FIFTH CIRCUIT'S DECISION IN FARKAS

Respondent finally argues that there is no conflict between the Ninth Circuit's decision below and the decision of the Fifth Circuit in *Farkas v. Texas Instruments, Inc.*, 375 F.2d 629 (5th Cir. 1967), *cert denied*, 389 U.S. 977 (1967), stating that *Farkas* involved an original proceeding in the district court, whereas the present case involves an action removed from state court. (Resp. Br. at 6-7) According to Respondent, a different test applies to each circumstance. Respondent is mistaken.

Section 1441(a) states that any action over which the district courts have original jurisdiction may be removed to the district court. 28 U.S.C. § 1441(a) Accordingly, as this Court noted in *Franchise Tax Board* and *Merrell Dow*, "the propriety of the removal . . . turns on whether the case falls within the original 'federal question' jurisdiction of the federal courts." *Franchise Tax Board*, 463 U.S. at 8; *Merrell Dow*, 106 S.Ct. at 3232. Thus, the test for federal jurisdiction is the same in both circumstances.

In *Farkas*, the Fifth Circuit held that federal question jurisdiction exists under § 1331 over a claim based upon an alleged violation of Executive Order 11246 even though the executive order does not permit a private judicial action to enforce its requirements. In its decision below, the Ninth Circuit held that § 1331 does *not* provide federal question jurisdiction over a claim based upon violation of Executive Order 11246 because the executive order does not create a private judicial action to enforce its requirements. Interpretation of the removal statute did not

even enter its discussion. The two decisions both involve an interpretation of federal question jurisdiction under § 1331, and they are in direct and irreconcilable conflict. As previously pointed out, the Ninth Circuit's approach also conflicts with this Court's decision in *Bell v. Hood,* 327 U.S. 678, 682 (1946), which involved a different regulatory scheme.

The "policy considerations" upon which Respondent relies to support his differentiation between an executive order claim originally filed in the district court and one originally filed in state court (Resp. Br. at 7) are not explained, and indeed are not even identified. Nothing in *Merrell Dow* supports a different interpretation of § 1331 in a removal context than in an original jurisdiction context. Under 28 U.S.C. § 1441(a), if the federal courts have jurisdiction under § 1331 in the context of an original proceeding, they also have jurisdiction over the claim in a removal context. Plaintiff cites no authority to the contrary.

The clear conflict between the Fifth Circuit and the Ninth Circuit, not only with respect to their specific rulings concerning jurisdiction over claims based upon alleged violations of Executive Order 11246, but also in their general approach to federal question jurisdiction in the absence of a private judicial action to enforce a federal statute's requirements, involve matters of significant federal interest, not only to the Executive Branch in connection with Executive Order 11246, but also to the federal judiciary and the federal bar in connection with the jurisdiction of the federal courts under § 1331. The federal interests at issue in both areas amply warrant this Court's issuance of a writ of certiorari.

IV

CONCLUSION

The issues raised by the Ninth Circuit's decision and in the petition for a writ of certiorari present significant questions of federal law and policy and have a direct and substantial impact on practice in the federal courts. The Ninth Circuit's decision significantly restricts the federal question jurisdiction of the federal courts, impairs substantial federal interests in the integrity of the administrative and remedial scheme under Executive Order 11246, and conflicts with the approach and rulings of the Fifth Circuit on the issues involved. The questions raised in the petition clearly are worthy of this Court's consideration. Varian's petition for a writ of certiorari therefore should be granted on each of the issues presented.

Dated: August 6, 1987.

Respectfully submitted,

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